KK Kumaran v TS Sambanthamurthi

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S1-24-296-1994
JAMES FOONG J
25 SEPTEMBER 1996

Land Law *— Sale of land — Order for — Whether the court has jurisdiction to order sale of land against the wishes of the registered proprietor — Plaintiff was owner of undivided share in land but share was unregistered — Whether there is any statutory provision to allow court to order sale — Courts of Judicature Act 1964 Sch item 3 — Rules of the High Court 1980 O 31 r 1*

Trusts and Trustees *— Land — Defendant registered as sole proprietor — Defendant admitted plaintiff's share — Whether defendant a trustee for plaintiff — Whether defendant could be forced to carry out sale — Specific Relief Act 1950 s 11(1)(a)*

Land Law *— Sale of land — Order for — Land charged with a loan — Interest mounting — Co-owners getting older — Whether necessary and expedient to order sale*

This claim raised the issue whether the court has jurisdiction to order the sale of land against the wishes of the defendant, the registered proprietor, by public auction to realize the plaintiff's claim for an undivided share of $^{15}/_{325}$. In 1975, the plaintiff paid a sum of RM15,000 for a share in the land and the plaintiff alleged that the defendant gave him the impression that the land would be subdivided. The plaintiff's allegation was not challenged. The defendant argued that there are no statutory provisions to allow the court to order sale except in foreclosure proceedings under s 256 of the National Land Code 1965 ('the NLC'), or under s 145 of the NLC where the parties were co-owners and partition of the land could not be effected. However, the plaintiff argued that under item 3 of the Schedule to the Courts of Judicature Act 1964 ('the CJA') and O 31 of the Rules of the High Court 1980 ('the RHC'), the court might order the sale of any land. The land in question was unencumbered other than a charge held by a third party, NESA.

Held, allowing the plaintiff's claim:

(1) Section 25(1) of the CJA gives the High Court jurisdiction to deal with all matters conferred by law, including those vested prior to the formation of Malaysia. Section 25(2) of the CJA gives the court additional powers, which include item 3 of the Schedule, which allows the court to direct sale in any cause or matter relating to land. This general power, however, shall be exercised in accordance with any written law or rules of court relating to the same (see p 314B–D).

(2) Although there is no written law providing jurisdiction to sell the land in this case, the court could rely on rules of the court, O 31 of the RHC, to exercise its power to order the sale of any land

which the court deems necessary and expedient to order so (see p 314E–H). A

(3) Although the land was registered in the name of the defendant as the sole proprietor, he did not deny the plaintiff's rights to a share in the land, thus making the defendant a trustee who was accountable for the plaintiff's $^{15}/_{325}$ undivided share in the land. As a trustee, under s 11(1)(a) of the Specific Relief Act 1950, the defendant could be forced to carry out acts which he had agreed to (see pp 315D–F and 316B). B

(4) With the loan from NESA standing at a sum of RM1.2m and default interest mounting, and the parties getting older, it was necessary and expedient to dispose of the land immediately by public auction (see p 315I). C

[Bahasa Malaysia summary

Tuntutan ini menimbulkan isu sama ada atau tidak mahkamah mempunyai bidang kuasa untuk membuat perintah ke atas jualan tanah bertentangan dengan kehendak defendan, yang merupakan tuan punya berdaftar, melalui lelong awam bagi merealisasikan tuntutan plaintif untuk suatu syer yang tidak dibahagikan sebanyak $^{15}/_{325}$. Dalam tahun 1975, plaintif membayar sejumlah RM15,000 untuk suatu syer dalam tanah dan plaintif mengatakan bahawa defendan telah memberikan tanggapan kepada plaintif bahawa tanah tersebut akan dibahagikan. Pengataan plaintif tidak dicabar. Defendan berhujah bahawa tiada terdapat peruntukan statutori yang membenarkan mahkamah untuk membuat perintah atas jualan kecuali dalam prosiding penamatan di bawah s 256 Kanun Tanah Negara 1965 ('KTN'), atau di bawah s 145 KTN di mana pihak-pihak adalah pemunya bersama dan pecah-bahagian tanah tidak boleh dikuatkuasakan. Namun demikian, plaintif berhujah bahawa di bawah perkara 3 Jadual Akta Mahkamah Kehakiman 1964 ('AMK') dan A 31 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), mahkamah boleh memberi perintah atas jualan mana-mana tanah. Tanah yang berkenaan adalah bebas daripada bebanan melainkan gadaian yang dipegang oleh suatu pihak ketiga, NESA. D E F G

Diputuskan, membenarkan tuntutan plaintif:

(1) Seksyen 25(1) AMK memberi Mahkamah Tinggi bidang kuasa untuk membicara perkara-perkara yang dikurniakan oleh undang-undang, termasuk perkara yang diletakhak sebelum penubuhan Malaysia. Seksyen 25(2) AMK memberi mahkamah kuasa tambahan, yang termasuk butiran 3 dalam Jadual, yang membenarkan mahkamah untuk mengarah jualan dalam apa-apa kausa atau perkara berkaitan dengan tanah. Walau bagaimanapun, kuasa am ini haruslah dilaksanakan menurut apa-apa undang-undang bertulis yang berkaitan dengan yang sama (lihat ms 314B–D). H I

(2) Walaupun tidak terdapat undang-undang bertulis yang memperuntukkan bidang kuasa untuk menjual tanah tersebut dalam kes ini, mahkamah boleh bergantung kepada kaedah-kaedah mahkamah, iaitu A 31 KMT, bagi melaksanakan kuasanya untuk membuat perintah ke atas jualan mana-mana tanah yang dianggap adalah perlu dan wajar (lihat ms 314E–H).

(3) Walaupun tanah tersebut didaftar atas nama defendan sebagai tuan punya tunggal, dia tidak menafikan hak plaintif kepada suatu syer dalam tanah tersebut, dan oleh yang demikian defendan adalah pemegang amanah yang bertanggungjawab atas syer plaintif kepada tanah yang tidak dibahagikan sebanyak $^{15}/_{325}$. Sebagai pemegang amanah, di bawah s 11(1)(a) Akta Relief Spesifik 1950, defendan boleh dipaksa menjalankan kewajipan seperti yang disetujui olehnya (lihat ms 315D–F dan 316B).

(4) Dengan pinjaman daripada NESA sebanyak RM1.2 juta dan faedah keingkaran yang semakin tinggi, dan pihak-pihak semakin tua, adalah perlu dan wajar untuk melupuskan tanah tersebut serta-merta melalui lelong awam (lihat ms 315I).]

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2605–2670.

Legislation referred to

Courts of Judicature Act 1964 s 25, Sch item 3
National Land Code 1965 ss 145, 256
Rules of the High Court 1980 O 31 rr 1, 2, 3, 4
Specific Relief Act 1950 s 11(1)(a)

Logan Sabapathy (*Logan Sabapathy & Co*) for the plaintiff.
LH Chua (*LH Chua & Co*) for the defendant.

James Foong J: The main crux of the plaintiff's claim in this originating summons is for an order that the land held under Padang Serai Lot No 1899, Mukim Sidam Kanan, Padang Serai, Kedah ('the said land'), now registered in the name of the defendant, be sold by public auction. This is with the intention of realizing the plaintiff's undivided share in the said land to the extent of $^{15}/_{325}$ ('the plaintiff's share'). Also included are prayers for accounts and enquiries to be taken of the defendant's financial dealings in the said land.

The plaintiff claims that sometime in 1975, the defendant approached him to buy a share in the said land, which he did. He paid to the defendant's solicitors a total sum of RM15,000 and received in return receipts confirming this purchase. He claims that the defendant gave him the impression that the land would be subdivided. Letters from the defendant and/or his solicitors found in exhs P2 and P7 in encl 2 support this view.

In 1985, pursuant to the plaintiff's enquiry on the status of his investment, the plaintiff was informed by the defendant that the said land had been sold, and upon receipt of the purchase price from the purchaser the plaintiff would receive his share of the profits. This did not materialize, causing the plaintiff to demand through his solicitors on 15 August 1992 of the defendant 'a proper resolution and payment for the purchase of our client's share of the said land at current market value, either by you or a third party'. A B

The defendant replied on 2 September 1993, enclosing a cheque of RM20,000 attempting to pay off the plaintiff. This the plaintiff refused as no agreement was reached on the total sum due to the plaintiff. Since no further settlement was reached between the parties, the plaintiff claimed he was forced to institute this action. C

The defendant never denied the allegation of the plaintiff. He explains that he attempted to sell the said land, first to M/S Malland Sdn Bhd ('Malland') for a sum of RM2.8m. Unfortunately, he claimed that this sale was aborted compelling him to sue Malland and four others. Instead of allowing his claim, the High Court at Kuala Lumpur awarded to Malland their counterclaim against the defendant for breach of the contract of sale, repayment of the deposit and part payment of RM265,000 and a further sum of RM400,000 'being the balance due pursuant to the terms of the revocation agreement and interest thereon as agreed'. Dissatisfied with this decision, the defendant has filed his appeal to the Court of Appeal. D E

Before the decision of the case against Malland was declared in the High Court, the defendant sold the said land to M/S Insular Development Sdn Bhd ('Insular') for a sum of RM3m. This transaction too, was aborted, alleged by the defendant to have been caused by Insular breaching the terms and conditions of the sale. Litigation resulted, but this time the defendant succeeded whereupon he benefited with a forfeiture of RM250,000 from the deposit and initial part payment made by Insular towards the purchase of the said land. F

The said land is presently registered in the name of the defendant as sole proprietor but is charged to a co-operative society known as NESA. This charge was created in consideration of a loan granted by NESA to the defendant to assist him in purchasing the said land. Out of the loan of RM300,000, the defendant declared that he had repaid 'RM110,000 and presently in default of further repayments'. G

The defendant further insisted that he had expended money on the said land for earthworks, cutting grass, clearing rubbish, legal and agency fees and on application for subdivision. The total sum with particulars attached amounted to RM159,250. H

Though expressing desire 'to dispose and sell the said land and repay NESA in full and to account to the plaintiff for his $^{15}/_{325}$ undivided share in the proceeds of the sale', the defendant still protests against the plaintiff's prayer for the land to be sold by public auction followed by consequential orders for accounts. This, he maintains, is 'not tenable in law and in fact'. I

In the meantime, the plaintiff's solicitors had done some investigations into the status of the said land. In so far as the transaction with Insular is concerned, the matter was settled when the (then) Supreme Court upheld the defendant's case against Insular for breach of the agreement to purchase the said land. The document of title to the land is now in the hands of a firm of solicitors known as M/S Dason & Co which holds it 'in escrow' pending the disposal of the appeal against Malland by the defendant or upon directions from the courts. As confirmed by the solicitors of Malland, they do not have any objections to the said land being sold to a third party due to the fact that Malland's counterclaim is not for the land but against the defendant personally for refund of the money and damages. In respect of the legal charge created by NESA, this co-operative society will be prepared to discharge the same upon the redemption sum being paid to them.

Considering the facts as stated above, counsel for both parties submit that the primary issue of this case is whether, in law, this court has the jurisdiction to order the sale of the said land against the wishes of the registered proprietor.

Mr Chua, counsel for the defendant, argued that there are no provisions in law to allow the court to order a sale of landed property except in foreclosure proceedings under s 256 of the National Land Code 1965 ('the NLC'), or under s 145 of the NLC where the parties are co-owners and partition of the land cannot be effected. Mr Sabapathy, counsel for the plaintiff, however disagreed. He enlightened this court of its powers under item 3 of the Schedule to the Courts of Judicature Act 1964 ('the CJA') and O 31 of the Rules of the High Court 1980 ('the RHC') to order sale of any land. In reply to this submission, Mr Chua interpreted that both these provisions of the law, ie item 3 of the Schedule to the CJA and O 31 of the RHC, are only limited to sales related to foreclosure actions and those falling within s 145 of the NLC.

Due to these submissions, it is necessary for this court to examine the relevant provisions highlighted.

The first is to scrutinize s 25 of the CJA, where the Schedule containing item 3 is referred to. Section 25 of the CJA reads as follows:

> 25 Powers of the High Court
>
> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
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> (2) Without prejudice to the generality of subsection (1) the High Court shall have the *additional powers* set out in the Schedule:
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> Provided that all such powers shall be exercised in accordance with *any written law or rules of court* relating to the same. (Emphasis added.)

The Schedule to the CJA has 17 items. The relevant item for the purpose of this case is number 3, which provides as follows:

> 3 Power to direct a sale instead of partition in any action for partition of land; and *in any cause or matter relating to land*, where it appears necessary or expedient, to order the land or any part thereof to be sold, and to give all necessary and consequential directions. (Emphasis added.)

Section 25(1) of the CJA is a general provision which gives jurisdiction to the High Court to deal with all matters conferred by the law, including those vested prior to the formation of Malaysia. Section 25(2) of the CJA, however, gives additional powers to the High Court. This is clearly evidenced by the declaration under this section with the words, 'Without prejudice to the generality of subsection (1) the High Court shall have additional powers ... ' What these additional powers are, are all listed in the Schedule to the CJA. Under item 3 of the Schedule, the power given to the court to direct sale is not only restricted to any action for partition of land, but also '... and in any cause or matter relating to land ...' This explicitly arms the courts with power to order sale of any land. However, there is a proviso attached, and that is: 'all such powers shall be exercised in accordance with any written law or rules of court relating to the same.'

On this proviso, it is also the contention of the defendant that there is 'no written law or rules of the court relating to the same' which allows the court to order such sale of land. 'The same', Mr Chua submitted, obviously refers to the right to sell any land, and since this application is not for foreclosure — which is allowed under s 256 of the NLC — or the partition under s 145 of the NLC, there is no law or rule to allow such sale.

Though it may be true that no written law exists to provide jurisdiction for this court to sell the said land, there are rules of court to depend upon for reliance. Evidently, the defendant has missed out O 31 r 1 of the RHC, which provides for 'Sales, Etc, of Immovable Property by Order of Court' and under r 1 it is provided:

> Where in any cause or matter relating to any immovable property it appears necessary or expedient for the purposes of the cause or matter that the property or any part thereof should be sold, the Court may order that property or part to be sold, and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

By virtue of this rule, the High Court is furnished with a provision of a written rule of court — as is required under the proviso of s 25(2) of the CJA — to exercise its power to order the sale of any land as it deems necessary and expedient to do so.

Dissatisfied with this realization, the defendant argued that O 31 r 1 of the RHC relates to an order for sale of charged properties or where partition of land owned by co-proprietors cannot be effected. For this claim, the defendant relied on O 31 r 4 of the RHC, which reads as follows:

> Rules 2 and 3 shall, so far as applicable and with the necessary modifications, apply in relation to the charge, exchange or partition of any immovable

property under an order of the Court as they apply in relation to the sale of any immovable property under such an order.

A mere reading of this rule will display no merits in the defendant's contention. Charge actions and partitions of co-proprietors' land have absolutely no relevance to O 31 r 1 of the RHC, which stands resolutely on its own. In fact, what r 4 means is that in relation to charge, exchange or partition of land under an order of the court, so far as is applicable O 31 rr 2 and 3 of the RHC shall apply. Rules 2 and 3 of O 31 deal with the manner of carrying out such sale, and the directions to be given by the court in respect of the payment of the purchase price and certification of the completion of the sale. It is for orders of sale made in respect of charge, exchange or partition that rr 2 and 3 of O 31 of the RHC should be adapted for use. It is not that the entire O 31 of the RHC is to be applicable to this sort of sale.

Now armed with jurisdiction and power to order a sale of the said land, this court shall proceed to examine the circumstances of this case to determine whether it is 'necessary and expedient' to do so.

To begin with, the defendant never denied the plaintiff's rights to a share in the said land. These are too well documented in the various receipts issued by the defendant's solicitors to the plaintiff and the letters written by the defendant to the plaintiff. Yet, the entire land is registered in the name of the defendant as the sole proprietor, with no disclosure of any attempts by the defendant to include the plaintiff as a co-proprietor. By recognizing the plaintiff's entitlement to an interest in the said land, and yet being the sole proprietor of the same, the defendant had declared himself as a trustee for the plaintiff's $^{15}/_{325}$ undivided share in the said land. As a trustee, he must account to the plaintiff. This he did by informing the plaintiff since 1981 that he was going to sell the said land, and from the proceeds of sale the plaintiff should receive his entitlement. One sale after another was transacted but none concluded. Instead, long legal battles were fought. In the meantime, the plaintiff is getting old and with further delay, may not enjoy the fruits of his investment.

From the evidence adduced and the information disclosed by counsel of both parties from the Bar, this court gathers that the said land is at present relatively free from legal entanglements. The only legal encumbrance over the said property is the loan due to NESA which, unless repaid in full, will not discharge the legal charge created in their favour. As for Malland's successful judgment in their counterclaim against the defendant, it is a claim in personam and does not affect the said land. The suit with Insular is over with a credit of RM250,000 in the defendant's account.

With a loan due to NESA standing at an alarming figure of RM1.2m and default interest mounting, and the ages of the parties advancing by the years, this court fails to understand why this said land should not be disposed of very quickly. What is the logic of waiting for a higher price when the loan with defaulting interest is edging up just as fast.

It is clear from the evidence that the plaintiff has attempted on many occasions to hurry the defendant to sell the said land, but sad to say, the defendant seemed unable to manage a successful conclusion of the deals. In addition, he seemed to treat the said land as that of his very own without much attention given to the plaintiff's interest. Being a trustee, the defendant can be forced to carry out acts which he had agreed to, under s 11(1)(a) of the Specific Relief Act 1950. In the light of these circumstances, this court hereby finds it necessary or expedient to order:

(a) the said land to be sold by private treaty to the highest offeror within four months from date hereof, with a reserve price to be determined on a forced sale basis by the firm of chartered valuers, CH William Talhar & Wong but provided always that it should not be lower than the redemption sum due to NESA;

(b) that CH William Talhar & Wong shall be appointed to conduct this said sale with any further directions that are deemed relevant and necessary to be given by the senior assistant registrar of this High Court;

(c) that the proceeds of sale must:

(i) first be applied to pay off the sum due to NESA to redeem the said land and to obtain therefrom the document of title, duplicate copy of the charge, the discharge of charge and all other relevant documents;

(ii) to pay off all expenses due to M/S CH William Talhar & Wong for the services they rendered for the valuation on the forced sale value of the said land and the sale of the same;

(iii) the balance to be deposited in court as contingency to satisfy any other claimants and the taking of accounts between the parties, and the same shall not be released until further order;

(d) that the defendant do execute the memorandum of transfer giving full effect to the successful purchaser of the said land in respect of this judicial order for sale, and in the event he fails, refuses and/or neglects to do so, the senior assistant registrar of this court shall proceed to execute the relevant documents and the relevant land office is hereby ordered to effect the relevant entries in the register of title into the name of the successful purchaser.

This court further allows prayers 2 and 3 of the plaintiff's prayer for the taking of accounts and related matters.

There shall also be costs to be paid by the defendant to the plaintiff.

There shall also be liberty to apply.

Order accordingly.

Reported by Tey Tsun Hang